LINGKARAN LUAR BUTTERWORTH (PENANG) SDN BHD

v.

PERUNDING JURUTERA D.A.H SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[ORIGINATING SUMMONS NO: R1-24-68-2004]
6 MAY 2005

ARBITRATION: *Arbitration clause - Existence of - Where agreement provides a procedure, parties must adhere to it - Court has no jurisdiction to compel parties to agree to arbitration proceedings contrary to arbitration clause*

ARBITRATION: *Arbitrator - Authority of - Whether arbitrator can order consolidation or concurrent hearing in absence of agreement thereof*

ARBITRATION: *Procedure - Revoking an arbitration proceeding - Sections 25(2) and 26(2) Arbitration Act 1952 - Allegation of fraud or misconduct - Whether party precluded by conduct from seeking to revoke arbitration proceedings*

The plaintiff was the contractor appointed for the design and construction of a bridge (the project). The plaintiff appointed the 2nd defendant as the contractor for the project and the 1st defendant to design the bridge. The plaintiff subsequently commenced proceedings in the High Court against the 2nd defendant seeking to termintate their contract. The 2nd defendant denied it was in default. Upon the application of the 2nd defendant, the High Court by consent granted a stay of proceedings pursuant to s. 6 of the Arbitration Act 1952 (the Act) for the parties to refer their disputes to arbitration. Both parties then consented to the appointment of the 3rd defendant as the arbitrator. Thereafter, a preliminary meeting in respect of the arbitration was held and the schedule for the conduct of the arbitration was discussed and agreed upon by the parties. Hearing dates were also fixed. The parties then filed their respective points of claim and points of defence and counter claim in the arbitration.

The plaintiff had earlier on requested the 1st defendant for their assistance in the arbitration. However, now the plaintiff found that the 1st defendant was unwilling to assist. As such, the plaintiff requested a stay of the arbitration between the plaintiff and the 2nd defendant. The 3rd defendant dismissed the plaintiff's application for stay. Hence, the plaintiff filed this Originating Summons

seeking a declaration that there were disputes between the plaintiff and the 1st defendant which ought to be tried and determined concurrently with the disputes between the plaintiff and the 2nd defendant and by the same arbitrator, that is, the 3rd defendant. The 1st defendant, in opposing the application contended that the plaintiff's disputes with the 2nd defendant arose out of a contract between the plaintiff and the 2nd defendant, and the arbitration proceedings was commenced pursuant to the clauses of the said contract. According to the 1st defendant, since it was not a party to the said contract, it should not be dragged as a party to the arbitration proceedings. The relationship between the plaintiff and the 1st defendant was governed by two other agreements which contained arbitration clauses stating that any dispute between them shall be referred to an arbitrator to be mutually agreed by the parties or to be appointed by the President of the Institute of Engineering, Malaysia. The plaintiff alternatively prayed that the court should revoke the 3rd defendant's power and injunct the arbitration between the plaintiff and the 2nd defendant so as to cause the matter to be heard in court and thereby allowing the 1st defendant to be brought in as a 3rd party.

Held (dismissing the application with costs):

[1] The plaintiff cannot straight away come to the court, urging the disputes between the plaintiff and the 1st defendant be referred to the 3rd defendant and the matter be tried and determined concurrently with the arbitration proceedings between the 2nd defendant and the plaintiff. Where the agreement provides a procedure, the parties must adhere to it. The court has no jurisdiction to compel the 1st defendant to agree to be joined in the arbitration proceedings between the plaintiff and the 2nd defendant. (p. 340 f-h)

[2] While the court has the power to consolidate actions, it is not the same with arbitration. Under the Act, unless the parties agree, the arbitrator himself cannot order consolidation or concurrent hearing. The parties must confer such power on the arbitral tribunal before it can order consolidation or concurrent hearings. Therefore, the court cannot compel the 1st defendant to refer the alleged dispute between the plaintiff and the 1st defendant to be tried and determined concurrently with the arbitration proceedings between the plaintiff and the 2nd defendant. (p. 341 c-d)

[3] The Act provides two sources of power to the courts to revoke an arbitration proceeding, that is s. 25(2) and s. 26(2). However, in the present case, fraud was not an issue in the dispute between the plaintiff and the 2nd defendant. Thus, s. 25(2) was not relevant to the present application.

There was also no allegation of misconduct made against the 3rd defendant. Thus, s. 26(2) was also not relevant to this application. The 3rd defendant's authority could not also be revoked pursuant to s. 3 of the Act. (pp. 342 d, f & 343 g)

[4] The High Court with the consent of the parties had stayed the proceedings under s. 6 of the Act in order for the parties to refer their disputes to arbitration. Accordingly, they agreed to the 3rd defendant to be the arbitrator. A preliminary meeting was held, the schedule for the conduct of the arbitration was discussed, hearing dates were fixed, the 2nd defendant had served its points of claim and the plaintiff had served its points of defence and counterclaim. Therefore, the plaintiff could not now make an about turn to have the dispute moved back to the court. The plaintiff by its conduct was precluded from seeking to revoke the arbitration. Moreover, there was a considerable delay on the part of the plaintiff in making the application. (pp. 344 f-h & 345 a)

Case(s) referred to:

Bina Jati Sdn Bhd v. Sum-Projects (Bros) Sdn Bhd [2002] 1 CLJ 433 CA ***(refd)***

Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping corporation [1981] 1 All ER 289 ***(refd)***

Panchu Gopal Bose v. Board of Trustees for Port of Calcutta [1994] vol 81 SC AIR 1615 ***(refd)***

WY Chin v. Sarahon Construction Sdn Bhd & Anor [1994] 4 CLJ 223 HC ***(refd)***

Legislation referred to:

Arbitration Act 1952, ss. 3, 6, 25(2), 26(2)

For the applicant - Beldam Premaraj (CM Owee); M/s Sivananthan

For the 1st defendant - S Kardasivam; M/s PG Lim & Co

For the 2nd defendant - Lambert Rasaratnam (Nitin Nadkarni & JL Foo); M/s Lee Hishamuddin Allen & Gledhill

Reported by Amutha Suppayah

JUDGMENT

Raus Sharif J:

By the originating summons dated 6 December 2004, the plaintiff sought against the defendants for the following orders:

I. A declaration that there are disputes between the plaintiff and the 1st defendant arising from the 2nd defendant's points of claim dated 19 July 2004 lodged by the 2nd defendant in the matter of a arbitration between the 2nd defendant and the plaintiff;

Consequently:

(i) An order that the disputes between the plaintiff and the 1st defendant be referred to arbitration and be tried and determined concurrently with the arbitration proceedings between the 2nd defendant and the plaintiff;

(ii) An order that the 3rd defendant be the sole arbitrator in respect of the arbitration between the plaintiff and 1st defendant;

Alternative consequence:

(iii) An order that the 2nd defendant be restrained forthwith from proceeding with the arbitration between the 2nd defendant and the plaintiff;

(iv) An order that the authority of the 3rd defendant as arbitrator in the arbitration between the 2nd defendant and the plaintiff, be revoked;

(v) A declaration that the 2nd defendant be at liberty to commence a suit in the High Court of Malaya in respect of the disputes or differences between the 2nd defendant and the plaintiff;

II. An order that the 2nd defendant and/or the 3rd defendant be restrained forthwith from proceeding further with the arbitration between the 2nd defendant and the plaintiff pending disposal of this originating summons;

III. Costs; and

IV. Any further or other relief as the Honorable Court deem fit.

The events leading to the plaintiff filing this originating summons are these. The plaintiff was appointed by the Government of Malaysia as the contractor for *inter alia*, the design, construction, completion and maintenance of a bridge over Sungai Prai, Butterworth, Penang (the project). By a letter of award dated 19 October 1996, the plaintiff appointed the 2nd defendant as the contractor for package IB of the project (the contract).

Prior to the appointment of the 2nd defendant, the plaintiff had appointed the 1st defendant to design the bridge for package IB. By the plaintiff's letter dated 16 December 1999, the 1st defendant was appointed the superintending officer's representative for the project.

On 21 January 2003, the plaintiff issued a notice of default under the contract to the 2nd defendant. Following the notice, the plaintiffs commenced proceedings in Kuala Lumpur High Court *vide* Suit No. D-22-86-2003 (the suit) against the 2nd defendant for *inter alia* the following relief:

(a) a declaration that any termination of the contract pursuant to the notice of default dated 21 January 2003 is lawful;

(b) an order that the off-site casting yard be delivered by the 2nd defendant to the plaintiff; and

(c) damages and costs.

Subsequently, a notice of termination was issued by the plaintiff to the 2nd defendant on 29 January 2003 on the basis of the alleged defaults as set out in the notice of default of 21 January 2003. The alleged defaults were: (i) the 2nd defendant's alleged failure to comply with its work programme; and (ii) the 2nd defendant's failure to comply with the S.O's instruction No. 23.

The 2nd defendant denied it was in default. According to the 2nd defendant, it was the plaintiff who was in default under the contract, and that consequently, the notice of default by the plaintiff was wrongful. The 2nd defendant contended that the plaintiff was in default by reasons, *inter alia* of the following:

(a) delay in the issue of construction drawings;

(b) late design information and inadequate design;

(c) inadequate instructions;

(d) extension of time were not properly assessed; and

(e) wrongful termination of the contract.

On 13 February 2003, on the application of the 2nd defendant, the High Court by consent granted a stay of proceedings pursuant to s. 6 of the Arbitration Act 1952 (the Act) for the parties to refer their disputes to arbitration. Thus, by a letter dated 27 March 2003, the plaintiff wrote to its solicitor and the 1st defendant directing them to begin their preparation for the impending arbitration between the plaintiff and the 2nd defendant.

On 14 November 2003, the 2nd defendant through its solicitor gave the plaintiff notice to arbitrate the disputes, and nominated Dato V.C. George, a retired Judge of the Court of Appeal to be the arbitrator. The plaintiff, through its solicitor's letter of 16 December 2003, rejected the nomination of Dato' V.C. George on the grounds that the disputes were technical in nature and instead proposed Mr. Leslie S. Homes, (the 3rd defendant) a retired civil engineer as arbitrator for the arbitration.

The 2nd defendant agreed to the nomination of the 3rd defendant. The 3rd defendant was notified of his appointment by the plaintiff's solicitor in a letter dated 20 February 2004.

On 26 February 2004 the plaintiff notified the 1st defendant of the appointment of the 3rd defendant as arbitrator in the arbitration and further requested the 1st defendant for their assistance in the arbitration. By a letter dated 10 May 2002, the plaintiff forwarded to the 1st defendant a proposed programme for the preparation of documents in respect of the arbitration.

On 17 May 2004, a preliminary meeting in respect of the arbitration was held before the 3rd defendant. The schedule for the conduct of the arbitration was discussed and agreed upon by the parties at this meeting including hearing dates from 26 September 2005 to 16 December 2005 and from 16 January 2006 to 7 April 2006.

On 17 July 2004, the 2nd defendant served its points of claim in the arbitration. By its solicitor's letter dated 10 August 2004 the plaintiff requested an extension of two months to file its points of defence and counter claim in the arbitration. The 3rd defendant granted an extension until 11 November 2004 for the plaintiff to serve its points of defence and counterclaim. Upon the plaintiff's request, the 2nd defendant agreed to a further extension until 18 October 2004 for the plaintiff to serve its points of defence and counterclaim. The plaintiff served its points of defence and counter-claim on 18 October 2004.

By its solicitor's letter dated 22 November 2004, the plaintiff indicated to the 3rd defendant and the 2nd defendant for the first time, its difficulty in obtaining the assistance of the 1st defendant. In the same letter the plaintiff requested a stay of the arbitration between the plaintiff and the 2nd defendant, failing which it would apply to court to injunct the arbitration proceedings and to remove the 3rd defendant.

On 23 January 2005, the 3rd defendant dismissed the plaintiff application for a stay of the arbitration. Hence, the plaintiff filed this originating summons seeking the various orders as stated earlier.

Findings

(i) Plaintiff's prayer against the 1st defendant

In gist, the plaintiff was seeking a declaration that there were disputes between the plaintiff and the 1st defendant arising from the 2nd defendant points of claim lodged by the 2nd defendant in the arbitration between the 2nd defendant and the plaintiff. Thus the plaintiff wanted the disputes between the plaintiff

and the 1st defendant to be tried and determined concurrently with the disputes between the plaintiff and the 2nd defendant and by the same arbitrator, that is, the 3rd defendant.

The 1st defendant in opposing the application contended that the plaintiff's disputes with the 2nd defendant arises out of a contract between the plaintiff and the 2nd defendant, and the arbitration proceeding was commenced pursuant the clauses of the said contract. According to the 1st defendant since it was not a party to the said contract, it should not be dragged as a party to the arbitration proceedings.

I am in agreement with the 1st defendant. Quite clearly in this case that the agreement between the plaintiff and the 2nd defendant was independent of the agreement between the 1st defendant and the plaintiff. The 1st defendant was not a party to the contract signed between the plaintiff and the 2nd defendant. Instead the relationship between the plaintiff and the 1st defendant was governed by two agreements signed by the plaintiff and the 1st defendant namely: (i) Consulting Engineering Agreement; and (ii) Supervising Consultant Agreement. Both the agreements contained identical arbitration clauses which stated that if any time in question, dispute or differences of opinion shall arise between the plaintiff and the 1st defendant upon or in relation to or in connection with the agreement or part thereof, either party may:

(a) give notice of the existence of such dispute or difference of opinion and the same shall be referred to arbitrator of a person to be mutually agreed; and

(b) failing agreement then within two months from the date of notice, a person appointed by the President of the Institute of Engineering, Malaysia to be the arbitrator.

Clearly, from the above provisions it was agreed between the plaintiff and the 1st defendant that any dispute or different of opinion between them shall be referred to an arbitrator to be mutually agreed by the parties. If the parties failed to agree, then the arbitrator shall be appointed by the President of the Institute of Engineering, Malaysia. With that clear provisions, surely, the plaintiff cannot now, straight away come to this court, urging the disputes between the plaintiff and the 1st defendant be referred to the 3rd defendant and the matter be tried and determined concurrently with the arbitration proceedings between the 2nd defendant and the plaintiff. I am of the view, where the agreement provides a procedure, the parties must adhere to it. The court has no jurisdiction to compel the 1st defendant to agree to be joined in the arbitration proceedings between the plaintiff and the 2nd defendant.

In *W. Y. Chin v. Sarahon Construction Sdn. Bhd. & Anor* [1994] 4 CLJ 223, Abu Mansor J. (as he then was) on the issue (i) whether the arbitrator had the jurisdiction to hear and make a declaratory order in a third party claim and (ii) whether it would be irregular, improper or procedurally incorrect for the arbitration to hear a third party claim, held as follows:

> The gist of private arbitration derives from the fact the parties have agreed to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonence with another dispute, however convenient that cause may be to the party seeking it and however closely associated the dispute in question may be.

I share the same view. While the court has always have the power to consolidate actions, it is not the same with arbitration. Under the act, unless the parties agree, the arbitrator himself cannot order consolidation or concurrent hearing. The parties must confer such power on the arbitral tribunal before it can order consolidation or concurrent hearings. In each case, the parties must agree to the consolidation of the dispute into one arbitration or that they should be run concurrently. Consequently, in the present case, I am of the view that the court cannot compel the 1st defendant to refer the alleged dispute between the plaintiff and the 1st defendant to be tried and determined concurrently with the arbitration proceedings between the plaintiff and the 2nd defendant.

(ii) Plaintiff's prayers against the 2nd defendant

The plaintiff's prayers against the 2nd defendant were the alternative prayers. As pointed out by the learned counsel for the 2nd defendant, what the plaintiff was really seeking by those prayers was to revoke the entire arbitration between the plaintiff and the 2nd defendant. Thus, the issue is whether this court has the power to do so.

In *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping corporation* [1981] 1 All ER 289 it was held that the courts have no common law jurisdiction to revoke an arbitration. The jurisdiction is purely statutory. Our Act provides two sources of power to the courts to revoke an arbitration proceedings, that is s. 25(2) and s. 26(2).

Sections 25(2) and 26(2) of the Act reads as follows:

> 25(2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and dispute which so arises involves the question whether any such party has been

guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

26(2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the High Court, or a sole arbitrator or all the arbitrators an umpire who has entered on the reference is or are removed by the High Court, the High Court may, on the application of any party to the arbitration agreement, either:

(a) appoint a person to Act as sole arbitrator in place of the person or persons removed; or

(b) order that the arbitration agreement shall case to have effect with respect to the dispute referred.

Section 25(2) is very specific. It provides that where an issue of fraud arises in a dispute between parties, the court may order that an agreement to arbitrate cease to have effect, and order the entire dispute be litigated in court. In our present case, fraud is not an issue in the dispute between the plaintiff and the 2nd defendant. Thus, s. 25(2) of the Act is not relevant to the present application.

Section 26(2) on the other hand, provides the courts with the general power to revoke an arbitration agreement where the authority of a sole arbitrator or umpire appointed is revoked by leave of court or where the sole arbitrator or umpire is removed by the court. But s. 26(2) is only a secondary remedy. The plaintiff would first need to obtain the primary remedy of either having the sole arbitrator or umpire removed, or his authority removed. In this case, for the plaintiff to remove the 3rd defendant, the plaintiff would have to show that the 3rd defendant has misconducted himself. But no allegation of misconduct has been made against the 3rd defendant in any of the plaintiff's affidavits. Thus, s. 26(2) is also not relevant to this application.

The next question then is, whether the 3rd defendant's authority may be revoked pursuant to s. 3 of the act. Section 3 reads:

3. The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court.

(a) any question of law arising in the course of the reference; or

(b) an award or any part of an award,

in the form of a special case for the decision of the High Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the High Court to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the High Court under this section shall be deemed to be judgment of the High Court within the meaning of section 67 of the Courts of Judicature Act 1964 [Act 91] (which relates to the jurisdiction of the Court of Appeal to hear and determine appeals from any judgment of the High Court), but no appeal shall lie from the decision of the High Court on any case stated under sub-s. (1)(a) without the leave of the High Court or of the Court of Appeal.

Clearly, the object of s. 3 is to impede the revocation of an arbitrator after he is properly appointed, not to facilitate it. Guidance on when an arbitrator's authority can be revoked is provided in *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta* [1994] Vol. 81 S.C. AIR 1615. It was held in that case that the authority of an arbitrator can only be revoked in the circumstances where there is:

(a) excess or refusal of jurisdiction by the arbitrator;

(b) misconduct by the arbitrator;

(c) disqualification of the arbitrator; and

(d) an exceptional case.

In this case, no allegation was made by the plaintiff of any circumstances which would bring this matter within (a) to (c) above. This leaves (d). But it is equally not part of the plaintiff's stated case. From the plaintiff's affidavits, it is apparent that the real reason for this application was the 1st defendant's apparent refusal to assist the plaintiff in the arbitration. It was when the 1st defendant's refused to assist the plaintiff on the plaintiff's term, did the plaintiff threaten the 1st defendant with a claim for indemnity. Thus, to me nothing exceptional about this matter. It is not an extraordinary case which can induce the court to Act under s. 3 of the Act.

It is the plaintiff's alternative prayer that this court should revoke the 3rd defendant's power and injunct the arbitration between the plaintiff and the 2nd defendant so as to cause the matter to be heard in court and thereby allowing the 1st defendant to be brought in the same suit using the 3rd party proceedings procedures as provided by the Rules of the High Court 1980. The plaintiff

relied strongly on the decision in *Bina Jati Sdn. Bhd. v. Sum-Projects (Bros) Sdn. Bhd.* [2002] 1 CLJ 433 CA. In that case, the respondent appointed the appellant as its main contractor to construct a hotel and apartment project in Port Dickson. Pursuant to the building contract, all disputes between the respondent and the appellant were required to be referred to arbitration. The appellant terminated the contract due to non-payment by the respondent of the sum of money purportedly due under the building contract. The parties agreed that their disputes under the building contract be dealt by way of arbitration and an arbitrator was accordingly appointed. However, after the first preliminary meeting was held between the parties, the respondent's solicitor gave notice to the arbitrator that they would be making an application to the High Court to revoke the authority of the arbitrator on the grounds that they wished to raise issues that they would not be suitable for arbitration. The respondent alleged that the appellant, the architect and the engineer were fraudulent. The respondent succeeded in the High Court in their application seeking *inter alia*, a declaration that the disputes between the respondent and the appellant were not arbitable and an injunction to restrain the appellant from proceeding with the arbitration. The Court of Appeal affirmed the decision of the High Court.

Clearly to me, the facts in Bina Jati is distinguishable from the present case. In Bina Jati there were allegations of fraud against the appellant, the engineer and the architect. There is no such allegation in the present case. In the present case what appears to be the reason for the applicant to make this application was their inability to get the corporation of the 1st defendant to assist them in their arbitration against the 2nd defendant and now wishes to take action against the 1st defendant. To me, the principle established in Bina Jati is not applicable in this case.

The next issue is this. On 13 February 2003, the plaintiff had commenced proceedings in the High Court against the 2nd defendant in respect of the disputes between them. The High Court with the consent of the parties stayed the proceedings under s. 6 of the Act in order for the parties to refer their disputes to arbitration. Accordingly, they have agreed to the 3rd defendant to be the arbitrator. On 17 May 2004, a preliminary meeting in respect of the arbitration was held before the 3rd defendant. The schedule for the conduct of the arbitration was discussed upon at the meeting, including hearing dates from 26 September 2005 to 16 December 2005 and from 16 January 2006 to 7 April 2006. The 2nd defendant had served its points of claim. Likewise, the plaintiff had also served its points of defence and counterclaim. That being

the case, I am of the view that the plaintiff cannot now make an about turn to have the dispute be moved back to the court. Thus, the plaintiff by its conduct is precluded from seeking to revoke the arbitration. Moreover from the facts of this case there is a considerable delay on the part of the plaintiff in making the application.

For the above reasons, the plaintiff's originating summons dated 6 December 2004 is hereby dismissed with costs.